91-725

(1)

Supreme Court, U.S.
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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

WILHELM ERNST SCHMITT,
PETITIONER,

V.

THE UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

WILHELM ERNST SCHMITT, PRO SE
REGISTER # 02118-041
c/o LEGAL RESEARCH SERVICE
P.O. BOX 4179
DALLAS, TEXAS 75208
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QUESTIONS PRESENTED FOR REVIEW

1) Whether the decision of the lower court is in conflict with the statutes enacted by Congress.

2) Whether the decision of the lower court is in conflict with the Supreme Court's decision in Grady v. Corbin, 109 L.Ed.2d 548 (1990) and Jones v. Thomas, 109 S. Ct. 2522.

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NO.

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OCTOBER TERM, 1991

WILHELM ERNST SCHMITT,
PETITIONER,

V.

THE UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioner, Wilhelm Ernst Schmitt, Pro Se, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in this matter.

OPINION BELOW AND STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Eighth Circuit from which the certiorari is sought was an unpublished summary affirmation of Schmitt v. United States, 752 F. Supp. 306 (D. Minn. 1990). See: Appendix A. This opinion was issued on May 23, 1991, and the Court's mandate was issued on June 3, 1991. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

RELEVANT STATUTORY PROVISIONS

The Petitioner was convicted of violating Federal Criminal Statutes U.S.C. §§ 372, 1111, 1114, 924 (c), 26 U.S.C. §§ 5861 (d) and 5871, 18 U.S.C. §§ 1202 (a)(1) and 2113 (a) and (e) in violation of 18 U.S.C. §§ 371. See: **Appendix B**, Indictment.

The specific portions of said act which are relevant to this petition are:

Title 18 U.S.C. § 924 (c):

"Whoever--

(1) uses a firearm to commit any felony for which he may be prosecuted in a court of the United States, or

(2) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States,

shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor for more than ten years. In the case of his second or subsequent conviction under this subsection, such a person shall be sentenced to a term of imprisonment for not less than two nor more than twenty-five years and not withstanding any other provision of law, the court shall not suspend the sentence in the case of a second or subsequent conviction of such a person or give him a probationary sentence, nor shall the term of imprisonment imposed under this subsection run concurrently with any term of imprisonment imposed for the commission of such a felony.

STATEMENT OF CASE

The Appellant, Wilhelm Ernst Schmitt, was charged in Criminal No. 6-84-124 in the District of Minnesota with conspiracy to injure and impede in violation of 18 U.S.C. § 372 (Count I); assaulting a federal officer in violation of 18 U.S.C. § 1111 and 1114 (Count II); possessing a firearm, a wallet derringer, in the commission of a felony[1] in violation of 18 U.S.C. § 924(c) (Count III); four counts of possession of an unregulated firearm in violation of 26 U.S.C. § 5861(d) and 5871 (Counts IV-VII);[2] and possession of a firearm, a

---

[1]The felony to which this Count refers is the charge in Count II.

[2]Count IV involved possession of an unregistered .22 caliber wallet derringer. Count V involved possession of an unregistered .308 caliber machine gun. Count VI involved possession of two unregistered hand grenades found in Schmitt's vehicle. Count VII involved

9mm. automatic machine gun, by a felon in violation of 18 U.S.C. App. 1202(a)(1). Schmitt was also charged in Criminal No. 6-84-125 with conspiracy to rob a bank with the taking of hostages (in violation of 18 U.S.C. § 2113(a) and (e) in violation of 18 U.S.C. § 371.

After separate trials in each case, Schmitt was convicted on all charges. On March 27, 1985, Schmitt was sentenced to an aggregate sentence of 26 years. Schmitt's sentence was imposed as follows:

1. Criminal No. 6-84-124-

a. Count I - 6 years;

b. Count II - 3 years to be served consecutive with Count I;

c. Count IV - VII - 10 years on each count to run concurrently with each other but consecutive to Counts I and II;

---

possession of two unregistered hand grenades found in Schmitt's residence.

d. Count VIII - 2 years to be served consecutive with all other counts.

2. Criminal No. 6-84-125 - 5 years to be served concurrent with sentence on Criminal No. 6-84-124.

Schmitt appealed his convictions to this Court. This Court affirmed Schmitt's conviction, See: United States v. Schmitt, 784 F.2d 880 (8th Cir. 1986).

Schmitt filed habeas corpus actions under 28 U.S.C. § 2255 in both criminal actions challenging his convictions and sentences. In his habeas petitions Schmitt alleged that the charges for which he was indicted and convicted were multiplicious because they were single steps in an overall criminal enterprise. He contended that as a result, his convictions and sentences were in violation of the Double Jeopardy Clause of the Constitution. The District Court

rejected Schmitt's claims and denied habeas relief. See: Schmitt v. United States 752 F. Supp. 306 (D. Minn. 1990). Schmitt now appeals the District Court's rulings on his habeas corpus petitions.

Both trials were presided over by the Honorable Edward J. Devitt, United States District Judge. Judge Devitt also ruled on the instant habeas corpus petitions.

Petition for Rehearing En Banc was filed on 15, June 1991 and denied on 5, August 1991. See: **Appendix C.**

REASONS FOR GRANTING THE PETITION

PROPOSITION I

In upholding the conviction on 18 U.S.C. § 924(c) the Court of Appeals for the Eighth Circuit completely ignored the statute enacted by Congress and, in so doing, violated the ex post facto clause, Article 1, Section 9, Clause 3, U.S. Constitution.

Prior to 1984, a person could not be sentenced under both 18 U.S.C. § 1111 and 924(c). See: U.S. v. Busic 446 U.S. 398 (1980). Congress amended this statute on October 12, 1984, **Pub. L. 98-473, Section 1005**, and, in so doing, apparently codified a violation of the double jeopardy provision of the Fifth Amendment into existing statutory law.

Schmitt was convicted of violating this statute October 31, 1984. The

amendment to this statute was not in affect October 31, 1984.

See: Appendix C which states "Effective date and Savings Provisions of the 1984 Amendment. Amendment by Pub. L. 98-473 effective on the first day of the first calendar month beginning thirty-six months after October 12, 1984, applicable only to offenses committed after taking effect of sections 211 to 239 of Pub. L. 98-473, as amended, set out as a note under section 3551 of this Title."

PROPOSITION II

The "BLOCKBURGER TEST" relied on by the lower court conflicts with this Court's decisions in Grady v. Corbin 109 L.Ed.2d 548 (1990) and Jones v. Thomas 109 S.Ct. 2522 (1989).

Grady v. Corbin 109 L.Ed.2d 548 (1990) relied on the "same evidence," not "different elements," test.

In the content of multiple sentencing, the purpose of the double jeopardy clause is to ensure that the sentencing courts do not exceed, by the device of multiple punishments, the limits prescribed by the legislative branch of government. Jones v. Thomas, 109 S.Ct. 2522 (1989).

Which is precisely what the district court did and the Court of Appeals for the Eighth Circuit upheld.

CONCLUSION

For the reasons stated, it is respectfully requested that the Petitioner's Petition for a Writ of Certiorari be granted.

Respectfully Submitted,

Wilhelm Ernst Schmitt,
Pro Se
Reg. #02118-041
c/o Legal Research
Services
P.O. Box 4179
Dallas, Texas 75208
(214) 941-7199

CERTIFICATE OF SERVICE

I, Wilhelm Ernst Schmitt, do hereby certify that a true and correct copy of the foregoing **PETITION FOR WRIT OF CERTIORARI** was placed in the United States Mail postage prepaid to the following:

Supreme Court of the United States
c/o Clerk's Office
1 First Street N.E.
Washington, D.C. 20543

Jon M. Hopeman
Assistant United States Attorney
234 U.S. Courthouse
110 South Fourth Street
Minneapolis, Minnesota 55401

United States Court of Appeals
for the Eighth Circuit
c/o Clerk's Office
U.S. Court and Custom House
1114 Market Street
St. Louis, Missouri 63101

on this 1ST day of ~~October~~ NOVEMBER, 1991.

Respectfully Submitted,

Wilhelm Ernst Schmitt, Pro Se
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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

NO. 91-1176

WILHELM ERNST SCHMITT,
APPELLANT,

V.

UNITED STATES OF AMERICA,
APPELLEE.

Filed June 3, 1991

Wilhelm Ernst Schmitt, a federal prisoner, appeals the judgment of the district court[1] denying his motion to vacate his sentences under 28 U.S.C. § 2255. Upon careful review of the record, we summarily affirm on the basis of the district court's opinion in Schmitt v. United States, 752 F. Supp. 306 (D. Minn. 1990).

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[1]The Honorable Edward J. Devitt, United States District Judge for the District of Minnesota.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA,	)	
	)	INDICTMENT
Plaintiff,	)	
	)	(18 U.S.C. §372)
v.	)	(18 U.S.C. §§111, 1114)
WILHELM ERNST SCHMITT, ROGER ROY LUTHER and ERNST W. FOUST,	)	(18 U.S.C. §924(c))
	)	(18 U.S.C. App. §1202(a)(1))
	)	(26 U.S.C. §5861(d),(f))
Defendants.	)	(26 U.S.C. §5871)

THE UNITED STATES GRAND JURY CHARGES THAT:

COUNT I

From on or about January 1, 1983, until the present, in the State and District of Minnesota, the defendants,

WILHELM ERNST SCHMITT,
ROGER ROY LUTHER, and
ERNEST W. FOUST,

did wilfully and unlawfully, combine, conspire, and agree together, and with

other persons whose names are to the Grand Jury known and unknown, to utilize force, intimidation and threats to injure and impede Peter Gandrud, an agent of the Internal Revenue Service, and any and all other federal law enforcement officers, from discharging the duty of enforcing the laws of the Internal Revenue Service against them, and that during the course of, and in furtherance of the aforesaid conspiracy, the persons named below did commit the following:

OVERT ACTS

On Sundays, from approximately January 1983 through October 1984, Wilhelm Ernst Schmitt hosted gatherings at his Bemidji, Minnesota, home to discuss religion as well as protestation of the tax laws of the United States, which meetings were from time to time

attended by Roger Roy Luther and Ernest W. Foust, and which meetings, from time to time involved discussions of the use of forcible resistance to enforcement of the tax laws of the United States.

2. From approximately January 1983, through October 1984, in the vicinity of Bemidji, Minnesota, Wilhelm Ernst Schmitt, Roger Roy Luther, and Ernest W. Foust discussed with one another and others their willingness to act upon their committed disagreement with the tax laws of the United States by arming themselves against possible efforts to enforce the tax laws against them.

3. From on or about January 1, 1983, through October, 1984, Wilhelm Ernst Schmitt and Roger Roy Luther procured and maintained stores of

firearms (including machine guns), ammunition (including armor piercing bullets), explosive devices, and manuals for the use of weaponry at their respective homes, in part to guard against possible efforts to enforce the tax laws against them.

4. From approximately January 1983, until October 1984, in Bemidji, Minnesota, Wilhelm Ernst Schmitt, openly stated at Sunday gatherings at his home, as well as to members of the public, that if law enforcement officers confronted him, he would not be taken alive, and intended to use violence against such officers.

5. On or about February 14, 1984, in the Federal Building in Bemidji, Minnesota, Ernest W. Foust approached Peter Gandrud, holding his hand in his

pocket in such a manner to suggest the presence of a handgun, stared at Gandrud, and walked away.

6. During the spring months of 1984, in Bemidji, Minnesota, Wilhelm Ernst Schmitt discussed with Ernest W. Foust the idea of using bombs to deal with Peter Gandrud, and during that time, in his Bemidji residence, experimented with a remote control device capable of detonating an explosive device.

7. On or about August 18, 1984, Ernest W. Foust visited Joseph McKinnon, in the rural Bemidji, Minnesota, area, at which time McKinnon saw him to be armed with a firearm under his arm, one on his side, and another contained inside a wallet; Foust stated to McKinnon that he was not going to pay taxes and that if

Peter Gandrud pursued him, "that'll be the end of him right there."

8. On or about October 31, 1984, in Bemidji, Minnesota, Wilhelm Ernst Schmitt personally armed himself with a Derringer pistol contained in a wallet-type case, and carried a loaded and cocked Browning 9mm. pistol in his vehicle, as well as a Fabrique Nationale machine gun, and two fragmentation grenades.

9. On or about October 31, 1984, near Nevis, Minnesota, Roger Roy Luther carried about a number of loaded handguns with him in his automobile, as well as a Mini-14 machine gun in the trunk of his automobile.

10. On or about October 31, 1984, in Bemidji, Minnesota, Wilhelm Ernst Schmitt attempted to use his wallet-

enclosed, loaded Derringer pistol during the course of execution of a search warrant upon him by agents of the Federal Bureau of Investigation.

All in violation of Title 18, United States Code, Section 372.

COUNT II

On or about October 31, 1984, in the State and District of Minnesota, the defendant,

WILHELM ERNST SCHMITT,

did wilfully, unlawfully, and forcibly assault, resist, impede, intimidate and interfere with Allen Garber and Stephen Gilkerson, agents of the Federal Bureau of Investigation, who were then engaged in the performance of their official duties, all in violation of Title 18,

United States Code, Sections 111 and 1114.

COUNT III

On or about October 31, 1984, in the State and District of Minnesota, the defendant,

WILHELM ERNST SCHMITT,

did knowingly and unlawfully carry a firearm, namely, a loaded High Standard, Model DM101, .22 magnum caliber wallet derringer, during the commission of the offense set forth in Count II herein, a felony subject to prosecution in a court of the United States, all in violation of Title 18, United States Code, Section 924 (c)(2), as amended (1984).

COUNT IV

On or about October 31, 1984, in the State and District of Minnesota, the defendant,

WILHELM ERNST SCHMITT,

did knowingly and intentionally possess on his person a firearm, namely, a High Standard, Model DM101, .22 magnum caliber wallet derringer contained in a wallet holster, which had not previously been registered to him in the National Firearms Registration and Transfer Record as required by Chapter 53, Title 26, United States Code, all in violation of Title 26, United States Code, Sections 5861(d) and 5871.

COUNT V

On or about October 31, 1984, in the State and District of Minnesota, the defendant,

WILHELM ERNST SCHMITT,

did knowingly and intentionally possess in his personal vehicle a Febrique Nationale, a .308 caliber machine gun,

which had not previously been registered to him in the National Firearms Registration and Transfer Record as required by Chapter 53, Title 26, United States Code, all in violation of Title 26, United States Code, Sections 5861(d) and 5871.

COUNT VI

On or about October 31, 1984, in the State and District of Minnesota, the defendant,

WILHELM ERNST SCHMITT,

did knowingly and intentionally possess in his personal vehicle two destructive devices, namely, two M-61 fragmentation hand grenades, Composition B, Lot LS-53-8, which had not previously been registered to him in the National Firearms Registration and Transfer Record as required by Chapter 53, Title 26,

United States Code, all in violation of Title 26, United States Code, Sections 5861(d) and 5871.

COUNT VII

On or about October 31, 1984, in the State and District of Minnesota, the defendant,

WILHELM ERNST SCHMITT,

did knowingly and intentionally possess in his residence two destructive devices, namely, two M-26A1 fragmentation hand grenades, Composition B, Lot LS-48-72, which had not previously been registered to him in the National Firearms Registration and Transfer Record as required by Chapter 53, Title 26, United States Code, Sections 5861(d) and 5871.

COUNT VIII

On or about October 31, 1984, in the State and District of Minnesota, the defendant,

WILHELM ERNST SCHMITT,

having been previously convicted in United States District Court, District of Minnesota of Escape from Federal custody, and in the District of Illinois of Intimidating and Impeding an Internal Revenue Officer and of Possession of Unregistered Firearms, all felonies, did knowingly possess, in and affecting commerce, a firearm, namely, a Browning, Hi-Power model, 9mm. semi-automatic pistol, all in violation of Title 18, Appendix, United States Code, Section 1202(a)(1).

COUNT IX

From on or about October 15, 1981, through about October 31, 1984, in the State and District of Minnesota, the defendant,

ROGER ROY LUTHER,

did knowingly and intentionally manufacture a firearm, namely, an RPB, M-10 Model, 9mm. fully automatic machine gun, without previously having received the required approval from the Secretary of the Treasury or his delegate, as required by Section 5822 of Title 26, United States Code, all in violation of Title 26, United States Code, Sections 5861(f) and 5871.

COUNT XI

From on or about August 8, 1980, through about October 31, 1984, in the

State and District of Minnesota, the defendant,

ROGER ROY LUTHER,

did knowingly and intentionally manufacture a firearm, namely, a Sturm Ruger, Mini-14 model, .223 caliber fully automatic rifle machine gun, with folding stock, without previously having received the required approval from the Secretary of the Treasury or his delegate, as required by Section 5822 of Title 26, United States Code, all in violation of Title 26, United States Code, Sections 5861(f) and 5871.

COUNT XII

On or about October 31, 1984, in the State and District of Minnesota, the defendant, did knowingly and intentionally possess a firearm, namely, an RPB, M-10 model, 9mm. fully automatic

machine gun, which had not previously been registered to him in the National Firearms Registration and Transfer Record, as required by Chapter 53, Title 26, United States Code, all in violation of Title 26, United States Code, Sections 5861(d) and 5871.

COUNT XIII

On or about October 31, 1984, in the State and District of Minnesota, the defendant,

ROGER ROY LUTHER,

did knowingly and intentionally possess a firearm, namely, a Fabrique Nationale, .308 caliber, fully automatic rifle machine gun, which had not previously been registered to him in the National Firearms Registration and Transfer Record, as required by Chapter 53, Title 26, United States Code, all in

violation of Title 26, United States Code, Sections 5861(d) and 5871.

COUNT XIV

On or about October 31, 1984, in the State and District of Minnesota, the defendant,

ROGER ROY LUTHER,

did knowingly and intentionally possess a firearm, namely, a Sturm Ruger, Mini-14 model, .223 caliber, fully automatic rifle machine gun, which had not previously been registered to him in the National Firearms Registration and Transfer Record, as required by Chapter 53, Title 26, United States Code, all in violation of Title 26, United States Code, Sections 5861(d) and 5871.

COUNT XV

On or about October 31, 1984, in the State and District of Minnesota, the defendant,

ROGER ROY LUTHER,

did knowingly and intentionally possess a firearm, namely, a Sturm Ruger, Mini-14 model, .223 caliber, fully automatic rifle machine gun with a wooden stock, which had not previously been registered to him in the National Firearms Registration and Transfer Record, as required by Chapter 53, Title 26, United States Code, all in violation of Title 26, United States Code, Sections 5861(d) and 5871.

A TRUE BILL

UNITED STATES ATTORNEY

GRAND JURY FOREPERSON

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
SIXTH DIVISION
Mag. Nos. 84-109-110

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	ORDER
WILHELM ERNST SCHMITT, ROGER ROY LUTHER,	)	
Defendants.	)	

The above matter came on before the undersigned on November 20, 1984, upon the written motion of the United States, to require the appearance of the above-named defendants before the United States Grand Jury at 9:00 a.m. on November 21, 1984. Based upon the motion of the United States, and all the files and proceedings herein,

IT IS HEREBY ORDERED:

That defendants Wilhelm Ernst Schmitt and Roger Roy Luther must appear before the United States Grand Jury at 9:00 a.m. on November 21, 1984.

Dated: November 20, 1984

MILES W. LORD, Chief
Judge, United States
District Court

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

NO. 91-1176MNST

WILHELM ERNST SCHMITT,
Appellant,

V.

UNITED STATES OF AMERICA,
Appellee.

Denied August 5, 1991

Appellant's pro se petition for rehearing with suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of majority of the active judges voting to rehear the case en banc.

The petition for rehearing is also ordered denied.

August 5, 1991

Order Entered at the Direction of the Court:

APPENDIX D

"Effective date and savings provision of the 1984 Amendment. Amendment by Pub. L. 98-473 effective on the first day of the first calendar month beginning thirty six months after October 12, 1984, applicable only to offenses committed after taking effect of sections 211 to 239 of Pub. L. 98-473, as amended, set out as a note under section 3551 of this Title.